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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Kelvin D. Daniel, et al.)
Plaintiffs,)
vs.)
Swift Transportation)
Corporation,)
Defendant.)
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Case No.: 2:11-CV-01548-ROS
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PLAINTIFFS' OPPOSITION TO
DEFENDANT'S RENEWED PARTIAL
MOTION TO DISMISS COUNTS ONE
THROUGH THREE OF PLAINTIFFS'
COMPLAINT
)

1 **I. OVERVIEW**

2 The Federal Fair Credit Reporting Act (FCRA), 15
3 U.S.C. §1681, *et seq.*, imposes strict and often complex
4 requirements on an entity that uses a "consumer report"
5 (e.g. a criminal records background check or a credit
6 report) for an employment purpose.
7

8 When a potential employer intends to use a report
9 it must provide disclosure of the intended use to the
10 consumer about whom the report will be obtained and
11 obtain authorization from the consumer-employee. 15
12 U.S.C. § 1681b(b) (2). Thereafter, before the employer
13 may contemplate using a derogatory report to take an
14 "adverse action" (e.g. delay, deny or terminate
15 employment), it must advise the applicant of that
16 possibility and provide a copy of the subject report.
17
18 15 U.S.C. §1681b(b) (3) (A). For some trucking
19 companies, in lieu of this "pre-adverse action" notice
20 and report, the employer must advise the applicant that
21 a job rejection was because of the report and of their
22 rights to obtain the report and dispute inaccurate
23 information in it. 15 U.S.C. §1681b(b) (3) (B). The
24 First Amended Complaint (FAC) (Dkt. No. 19) plausibly
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1 alleges that Defendant willfully failed to comply with
2 each of these requirements.

II. BACKGROUND

Congress enacted the Fair Credit Reporting Act ("FCRA") in 1970 to better ensure that consumer reports were accurate and to protect consumers from their arbitrary use:

10 Employers were placing increasing reliance on
11 consumer reporting agencies to obtain
12 information on the backgrounds of prospective
13 employees. Congress found that in too many
14 instances agencies were reporting inaccurate
15 information that was adversely affecting the
16 ability of individuals to obtain employment.
17 As Representative Sullivan remarked, "with the
18 trend toward ... the establishment of all
19 sorts of computerized data banks, the
20 individual is in great danger of having his
21 life and character reduced to impersonal
22 'blips' and key-punch holes in a stolid and
23 unthinking machine which can literally ruin
24 his reputation without cause, and make him
25 unemployable." 116 Cong. Rec. 36570 (1970)."

Dalton v. Capital Associated Indus., Inc., 257 F.3d 409, 414 (4th Cir. 2001). These consumer oriented objectives support a liberal construction of the FCRA. Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995).

27 In soliciting and considering employees, Swift
28 Transportation ("Swift") obtains and uses consumer

1 reports containing personal information, employment
2 histories and criminal record histories. The use of
3 these consumer reports is not without legal limit as
4 the FCRA imposes a rigorous regime that restricts the
5 use of employment reports, including in the trucking
6 industry, to limited circumstances and on very defined
7 terms.
8

9 Though proof of "inaccuracy" is not a necessary
10 element of the specific FCRA claims alleged in this
11 case, the consumer reports obtained and then later used
12 by Swift regarding the Plaintiffs were materially
13 inaccurate. This is likely true for a large number of
14 consumers who were the subject of an employment report
15 obtained and used by Swift as such employment reports -
16 usually lacking social security matches and other more
17 sophisticated data found in conventional credit reports
18 - are historically inaccurate.¹ For some consumers,
19 like the named Plaintiffs, the FCRA provides a remedy
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25¹ See e.g. [http://abcnews.go.com/Technology/background-
check-wrongly-ids-job-applicant-sex-
offender/story?id=14405696#.Ttk1bkpLofI](http://abcnews.go.com/Technology/background-check-wrongly-ids-job-applicant-sex-offender/story?id=14405696#.Ttk1bkpLofI) last visited
26 December 8, 2011 ("We see lots and lots of examples of
27 background checks done wrong," said Dietrich, who noted
28

1 and means to correct material inaccuracies in their
2 employment reports.

3 However, even for consumer who may suffer a
4 derogatory, but accurate report, the FCRA employment
5 report rights are important. *Williams v. Telespectrum,*
6 *Inc.*, CIV.A.3:05CV853, 2007 WL 6787411 (E.D. Va. June
7 1, 2007). ("The statute contemplates a wide range of
8 responses beyond correcting inaccuracy-to 'discuss' the
9 report, or to 'otherwise respond.' ")

12 **III. Legal Argument**

14 **A. The FAC plausibly alleges violations of the**
15 **FCRA.**

16 The Plaintiffs each assert claims against Swift in
17 its capacity as a "user" of employment purposed²
18 background checks - consumer reports in FCRA parlance.
19 See 15 U.S.C. § 1681a(d). Section 1681b(b) prohibits
20 the use of a consumer report for employment decisions
21 until and unless the employer has complied with the
22 provisions strict mandates. Plaintiffs allege that
23 Swift unlawfully obtained and used consumer reports
24 about job applicants without first providing an FCRA

28 "Employment purposes" relate to the "evaluation of a
consumer for employment, promotion, reassignment or
retention" as an employee. 15 U.S.C. § 1681a(h).

1 compliant notice or obtaining a proper authorization
2 from each applicant. (Doc. 19, ¶30); 15 U.S.C. §
3 1681b(b)(2). Further, Plaintiffs allege that Swift
4 willfully ignored its obligation to provide rejected
5 applicants an explanation that they were not hired
6 because of their consumer report and notice of the FCRA
7 rights and dispute remedies available to them. (Dkt.
8 No. 19 at ¶31); 15 U.S.C. § 1681b(b)(3).

11 Most employment applications or positions fall
12 within the purview of § 1681b(b)(2)(A)(i), which
13 requires that an employer provide a clear and
14 conspicuous disclosure in writing **before** procuring the
15 report. This section also requires the employer to
16 obtain a written authorization from the job applicant
17 after making the disclosure and before obtaining the
18 report. 15 U.S.C. § 1681b(b)(2)(A)(ii); see also
19 *Reardon v. Closetmaid Corp.*, CIV.A. 08-1730, 2011 WL
20 1628041 (W.D. Pa. Apr. 27, 2011).

24 An employer's obligation to obtain the
25 applicant's authorization "before the report is
26 procured" is unambiguous and has a clear meaning. *Id.*
27
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1 However, the "Clear and Conspicuous" stand-alone
2 disclosure and "Written Authorization" requirements
3 found under § 1681b(b)(2)(A)(i) and(ii) do not apply to
4 applicants seeking a trucking position by mail,
5 telephone, computer or other similar means. Rather
6 this narrow category of not-in-person trucking
7 applicants is entitled to receive notice and provide
8 authorization in writing, **orally, or electronically.**
9 See 15 U.S.C. § 1681b(b)(2)(B). The oral, written or
10 electronic notice that a consumer report will be
11 obtained is coupled with a requirement that the
12 employer notify the applicant of a right to receive a
13 free copy of the consumer report provided by the CRA
14 within 60 days **and** a right to dispute the accuracy and
15 completeness of the report. *Id.* Most important, **after**
16 receiving these notifications, the applicant must
17 likewise authorize in writing, orally or electronically
18 the procurement of the consumer report. See 15 U.S.C.
19 § 1681b(b)(2)(B)(ii).

20 In addition to providing applicants with consumer
21 rights regarding the procurement of a consumer report
22 for employment purposes, § 1681b also affords certain
23

1 rights when adverse action is taken based in whole or
2 in part on the report. See 15 U.S.C. § 1681b(b)(3).
3 Like the provisions of § 1681b(b)(2), § 1681b(b)(3)
4 distinguishes between trucking applicants with in-
5 person contact and those who apply by mail, telephone,
6 computer or other similar means. As to in-person
7 applicants, § 1681b(b)(3)(A) provides that **before**
8 taking adverse action based on the consumer report, the
9 employer must provide the applicant: (1) with a copy of
10 the report, and (2) a written statement of rights
11 prescribed by the Federal Trade Commission under §609
12 of the FCRA. Conversely, for trucking applicants who
13 apply via mail, telephone, computer or other similar
14 means, the employer must provide the applicant, within
15 three (3) days of taking adverse action, an oral,
16 written or electronic notification:

- 21 1. that adverse action was taken in whole or
22 in part on the report received from a
23 CRA;
- 24 2. of the name, address and telephone number
25 of the CRA that furnished the report;
- 26 3. that the CRA did not make the adverse
27 decision and cannot provide the applicant
28 with a specific reason the adverse action
 was taken; and

1 4. that the consumer may, upon providing
2 proper identification, request a free
3 copy of the report and dispute with the
4 CRA the accuracy or completeness of the
5 report.

6 Lastly, as with § 1681b(b) (2) (B), § 1681b(b) (3) (B)
7 provisions apply only if the applicant has had no in-
8 person contact with the employer **prior** to the
9 procurement of the report.

10 **B. Dismissal of Daniel from Counts One and Two is**
11 **premature and would be erroneous.**

12 The FAC alleges that Daniel applied for employment
13 with Swift on-line (Dkt. No. 19 at ¶9), but had in-
14 person contact with Swift prior to Swift procuring his
15 consumer report (Dkt. No. 19 at ¶11). Under such
16 circumstances, Daniel would have been entitled "in-
17 person" application protections under §
18 1681b(b) (2) (A) and §1681b(b) (3) (A). Swift argues,
19 however, that Daniel's "in-person" claims should fail
20 because Swift procured Daniel's consumer report prior
21 to the orientation. (Dkt. No. 24 at P.5, lns. 1-4).
22 In support of this argument, Swift attaches an
23 unauthenticated one page document from USIS Commercial
24 Services, Inc. dated December 28, 2010. Though Swift
25 may attach documents to its motion to dismiss, the

1 Court may not consider documents that have questionable
2 authenticity and are relied upon by a pleading. *Kaprof*
3 v. *Insight Enters.* 2010 U.S.Dist. LEXIS 128621 *5-6.
4 Further, a court may not take judicial notice of a fact
5 that is "subject to reasonable dispute". *Id.* This is
6 even more equitably true in a case as this one where
7 Defendant's alleged law-breaking is its failure to
8 provide the Plaintiff a copy of the very report it now
9 first discloses in its opposition.

12 Swift would have the Court ignore Plaintiffs'
13 plausible claim by applying a summary judgment standard
14 of review in appropriate at this state of the
15 proceedings. See *Shapiro v. Matrixx Initiatives, Inc.*,
16 2011 U.S. Dist. LEXIS 111159 (D.Ariz.Sept. 26, 2011)
17 (citing *Iqbal*, 129 S. Ct. at 1949) ("A claim has facial
18 plausibility when the plaintiff pleads factual content
19 that allows the court to draw the reasonable inference
20 that the defendant is liable for the misconduct
21 alleged"). Indeed, Plaintiffs dispute that the
22 attachment is a consumer report as it does not provide
23 any consumer report data and rather merely makes
24 reference to a "Widescreen Package Product Request

1 Information" **request** on December 28, 2010. A report
2 typically indicates at a minimum that no results were
3 found or contains information regarding a purported
4 criminal background. *Compare Smith v. Waverly Ptnrs.,*
5 *LLC*, 2011 U.S. Dist. LEXIS 90135 (W.D.N.C. Aug. 12,
6 2011) ("Plaintiff's name, Social Security Number, prior
7 addresses, date of birth, and driver's license
8 information...does not bear on any of the seven
9 enumerated factors in § 1681a(d), and is thus not a
10 consumer report") with *Swift's Answer to Plaintiff's*
11 *First Amended Complaint* (Dkt. No. 23 at ¶29, "Swift
12 admits that it has obtained criminal background reports
13 from consumer reporting agencies during the last few
14 years.")

15 The FAC also alleges that Swift took adverse
16 action against Daniel by dismissing him from
17 orientation based upon information received in a
18 consumer background report. (Dkt. No. 19 at ¶13)
19 Because the protections afforded under § 1681b(b) (2) (A)
20 and § 1681b(b) (3) (A) hinge on when Swift procured the
21 consumer report, Plaintiffs should be provided an
22 opportunity to conduct discovery to determine if the
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1 attachment is in fact a true and correct copy of the
2 alleged consumer report used by Swift to terminate
3 Daniel. Indeed, dismissal of Daniel's claim is
4 premature at best; rather at worst, Daniel would be
5 reclassified as a non-in-person applicant if discovery
6 yields information consistent with Swift's theory.³
7

8 Moreover, even if the attachment is a consumer
9 report, discovery should be conducted to determine why
10 Swift would procure applicants' consumer reports, be
11 aware of negative content, and still haul applicants
12 from across the country to attend orientation only to
13 send them home midstream. This conduct also begs for
14 fact discovery, including what incentive, if any, Swift
15 has to drag applicants like Daniel across the United
16 States to attend orientation only to send them home
17 based on consumer reports procured prior to the
18 orientation. (Dkt. No. 32 at ¶13, "Swift admits that
19 it did not hire Daniel and that Daniel was dismissed
20 from orientation.").

21

22³ Defendant's timing allegation are also inconsistent
23 with the FAC allegation that the Plaintiff's
24 disqualification did not occur until after he had been
25 asked to and allowed to attend employment orientation.
26 If the disqualifying report was obtained before, a
27 fact-finder could reasonably conclude that the employer
28 had not yet "used" the disqualifying report.

1 **C. Bell could not authorize the procurement of a
2 consumer report if he was never advised that
3 such a report would be procured.**

4 Conceding the plausibility of almost all of
5 Plaintiffs' remaining claims, Swift presents only one
6 other argument in support of its motion for partial
7 dismissal Mr. Bell's claim. Defendant argues that it
8 did not violate § 1681b(b) (2) (B) as to Bell because it
9 obtained his signature following the barely legible
10 text at the end of his application. That text would
11 have advised a comprehending reader that he or she was
12 giving to Swift, "the right to investigate all
13 references and to secure additional information about
14 me, if job-related." Dkt. No. 19-2 at 3. Nothing more.
15 It never mentions, informs or suggests the involvement
16 of a federally regulated consumer reporting agency. It
17 never mentions the phrase "consumer report" much less
18 advises Bell that he could obtain a free copy of the
19 consumer report and dispute its accuracy.
20 §1681b(b) (2) (B) (i). Defendant's logic - its suggestion
21 that because the language is so broad it should catch
22 every possible type of information, including FCRA
23 governed data - ignores the important remedial purposes
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1 for the FCRA rights and protections. It could just as
2 well have stated: "You agree that we can do anything
3 at all to evaluate your application." That
4 authorization would be just as all broad, and just as
5 ineffective.

6 Swift's entire argument is rooted in its
7 misconception that Congress somehow "relaxed" FCRA
8 compliance in 1998 when retooling disclosure and
9 authorization requirements for truck drivers. Rep.
10 LaFalce explained the amendments: "The legislation
11 would add several narrowly crafted exceptions to FCRA
12 that would permit - where employment applications are
13 taken by phone, mail or electronically - greater
14 flexibility in providing required disclosures and
15 authorizations either by 'oral, written or electronic
16 means'" In short, the content of the disclosure and
17 the veracity of the authorization remained intact; only
18 the means by which the information is communicated was
19 affected. Lynne B. Barr & Barbara J. Ellis, *The New*
20 *Fcra: An Assessment of the First Year*, 54 Bus. Law.
21 1343, 1349 (1999) ("The 1998 Amendments drew a very
22 narrow exception to this requirement, and now permit
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1 certain employers to provide the prior disclosure and
2 obtain the prior authorization orally or electronically
3 if there has been no "in-person" contact before the
4 consumer report is procured.")
5

6 Swift argues that its application contains the
7 necessary verbiage to constitute a general, limitless
8 authorization to obtain any information from any source
9 regarding applicants. Notably, Swift provides no
10 authority for such an untenable position, as none
11 exists. Consumer reports are a unique species of
12 personal information, and are subject to federal
13 regulation in part due to the notoriously convoluted
14 way they are prepared. Thus notification of one's
15 right to receive a copy of the consumer report together
16 with notice of the right to dispute its accuracy
17 remains paramount to the application and screening
18 process.
22

23 The FCRA treats the disclosure of these rights as
24 a condition precedent to a consumer's authorization.
25 See generally *Lagrassa v. Gaughen*, 2011 U.S. Dist.
26 LEXIS 34323 (M.D. Pa. Mar. 30, 2011) (in the context of
27 § 1681b(b)(2)(A), "before obtaining a consumer report,
28

1 the employer must first disclose to the potential
2 employee that the employer may obtain a report **and then**
3 the employee must authorize, in writing, the
4 procurement of the report.") Swift baldly asserts that
5 its application satisfies the requirements of §
6 1681b(b)(2)(B)(ii), without attempting to address its
7 failure to notify applicants in accordance with §
8 1681b(b)(2)(B)(i). Moreover, Swift does so despite the
9 fact that its purported disclosure does not even use
10 the terms, "criminal background", "consumer report",
11 "dispute", "free copy", and "consumer reporting
12 agency". See *Burghy v. Dayton Racquet Club, Inc.*, 695
13 F. Supp. 2d 689, 698 (S.D. Ohio 2010) (valid FCRA
14 disclosure under § 1681b(b)(2)(A) stated certain job
15 functions "require **credit history checks**, and I
16 understand **credit-reporting agencies**, credit/bankruptcy
17 litigation, and **credit reports** may also be included").
18

23 **IV. Conclusion**

24 Plaintiffs respectfully request that the Court
25 deny Defendant's Partial Motion to Dismiss.
26

27 Respectfully Submitted,

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1 /s/ Dennis M. O'Toole
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10 /s/ Leonard A. Bennett
11 /s/ Susan M. Rotkis
12 *Counsel for Plaintiffs*

13 **CERTIFICATE OF SERVICE**

14 This will certify that a copy of the foregoing
15 Plaintiffs' Response to Defendant's Motion to Dismiss
16 was filed electronically this 8th day of December,
17 2011. Notice of this filing will be sent to all counsel
18 of record by operation of the Court's electronic filing
19 system.

20
21 /s/ Susan M. Rotkis
22 *Counsel for Plaintiffs*

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